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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 848 OF 1991

The state of Maharashtra ... Appellant

V/s

1. Ravikant Shankarappa Patel; & ors. ... Respondents

Mr. P.S. Shitole, A.P.P. for the State.

Mr. Ashok Mundargi, Sr. Advocate with Shri Nitin Jamdar for respondent Nos. 1 and 11.

Mr. Milind Deshpande for respondent Nos. 4 and 12.

Mr. Suresh Sabrad for respondent Nos. 5 to 7 and 13.

Mr. B.R. Patil for respondent No.3.

CORAM: D. G. DESHPANDE &
SMT. NISHITA MHATRE, JJ.

DATED: 22ND JUNE, 2007.

ORAL JUDGMENT (PER DESHPANDE, J.):

1. This is an appeal filed by the State.

2. Heard all the advocates for the accused respondents.

3. At the outset, Mr. Mundargi contended that in view of the two judgments of the Supreme Court reported in

A.I.R. 1981 SC 1571 between State of Maharashtra v/s Eknath Yeshwant Pagar and another **unreported judgment of the Supreme Court in Criminal Appeal No.1233 of 2003 between Dnyaneshwar Narayan Pote v/s State of Maharashtra,** the present appeal does not survive because the accused No.10 was the person who was the main assailant and allegedly killed Ganesh Kolekar who died during the pendency of the trial. He, therefore, contended that he was the main person in the attack and, therefore, if he dies during the pendency of the trial, in view of these two judgments, no case survives against the accused respondents particularly when they were acquitted by the trial.

4. From the unreported judgment of the Supreme Court in **Criminal Appeal No. 1233 of 2003 between Dnyaneshwar Narayan Pote v/s The State of Maharashtra,** Section 34 of the Indian Penal Code was involved, whereas in the present case the charge against the accused was of conspiracy under Section 123 of the Indian Penal Code. Discussion of the trial Court regarding this charge is at para 8 on page 295 of the judgment and the question formulated in that regard was point No.2 i.e. "Does prosecution prove that the accused have committed conspiracy to commit the murder of deceased Ganesh Kolekar or Subhash Narote." In this regard, the Court

came to the following conclusion:-

> "8. **Point No.2:-** The prosecution case in detail about conspiracy can be stated at this stage that there was meeting of accused No. 1 to 12 and 15 in Ravishankar bungalow at two three times, fifteen twenty days prior to 2.8.1989 and in the said meetings they decided to take revenge of Balu Shinde and Subhash Narote the heads of rival gang and they decided to take the help for the same from the outsiders and they decided to call the members of Thapa gang from Bombay and the concerned persons were contacted on phone and the plan to kill Subhash Narote and Balu Shinde was prepared. Then persons from Bombay had been to Solapur and the accused Nos. 13, 14 and the absconding accused from Bombay were kept in Hotel Parijat. Then there was meeting between the accused before the Court in the trial and the absconding accused in Ravishankar bungalow as well as in hotel Parijat which is situated just near Ravishankar bungalow and then the plan came into success by killing Ganesh Kolekar. But at this stage, it will be proper to mention that the prosecution is not able to lead the evidence on the point of conspiracy as the main and star witnesses on the point of conspiracy or the plot to commit the murder have not supported the prosecution case, as the evidence of PW-10 Shrihari Madane, the waiter of Parijat hotel (Exh.78) and PW-11 Arvind Dama, the owner and proprietor of Parijat Hotel (Exh.79) have not supported the prosecution case. It is to be mentioned that both the PWs are cross-examined on behalf of prosecution. But nothing came out or revealed during the cross-examination that the accused had meeting prior to the incident in hotel Parijat or in Ravishankar bungalow and there was plot to kill Subhash Narote, Balu Shinde. Similarly, the star witness of the prosecution is PW-22 Mohan Agrawal (Exh.107) has not supported the prosecution case and the learned Public Prosecutor for the State submitted that the facts revealed during the cross-examination shall be treated as proved and it be held that there was plot to kill and conspiracy between the accused. But the evidence of PW Mohan Agrawal does not disclose

that he has stated portion marked A to F that he was present when there were meetings between the accused and they prepared the plan and decided to kill Subhash Narote and Balu Shinde. Moreover, the statement of Agrawal is recorded by the Investigating Officer on 5.8.1989 after three days of the incident and it appears from the contradictions claimed by the prosecution that he has also taken part in the plan. But he refrained himself in joining the conspiracy. Thus, the contradiction i.e. statement before police cannot be taken into consideration, which is at Exh.138 to come to the conclusion that there was conspiracy between the accused.

9. The evidence of PW-5 Toradmal (Exh.67) on which the prosecution wants to rely that in pursuance of the common object some of the accused had been to Pune and they brought biscuit colour Maruti van bearing No. MEN-9974 in which some of the accused were sitting and opened the fire in the air. But the evidence of PW Todarmal (Exh.67) does not disclose that particular accused had been to him. But this evidence disclose that he had been to Takawale, where Takawale introduced one Katariya and asked him to give Maruti van to him on 1.9.1989 and accordingly he has given the same to some persons on 1.8.1989 and same was returned to Takawale on 4.8.1989 and it was attached by police later on. But I have already mentioned that he does not state that any particular assuced had been to him or he gave his Maruti van to any one out of accused nor he is identifying any accused before the Court. Moreover, the prosecution has not adduced the evidence of Takawale as well as the Katariya. Thus, the evidence of Todarmal cannot be accepted that there was conspirary or plot prior to the incident. 5. It will be clear from the aforesaid finding that the Court did not believe the case of conspiracy because two important witnesses PW-10 and PW-11 did not support the prosecution. We asked the learned A.P.P. after our reading of the evidence of those two witnesses whether he will be in a position to make out the case of conspiracy against the accused. The learned A.P.P. formally conceded that when the witnesses have not

supported the prosecution at all, it will be impossible for him to make the case of conspiracy. However, apart from the aforesaid concession made by the learned A.P.P. we were take to the deposition PW-10 and PW-11 and PW-22 on the point of conspiracy but they have not supported the case of conspirary on a single point and, therefore, we have to confirm the finding of the trial Cou the prosecution has failed to prove the conspirary.

10. The prosecution wants to establish the meetings between the accused by relying on the evidence of PW-14 Avinash Khune (Exh.86). The evidence of said P.W. disclose that he is running roasted mutton shop in Kanna Chowk, Solapur. On 2.8.1989 at about 11.00 a.m. accused Nos. 2 and 12 had been to him and placed order for 3 Kg. rost mutton and the order was delivered in Ravishankar bungalow. This is the evidence on which the prosecution wants to rely the conspiracy or the presence of all the accused in Ravishankar bungalow. But except the order placed by accused Nos. 2 and 12 and the delivery of the order, there is no other evidence to come to the conclusion that the accused had conspiracy or they had gathered in Ravishankar bungalow. On the contrary, this witness not identified accused Nos. 2 and 12 who placed the order to him and the witness has not supported further prosecution case. Hence, he is cross-examined on behalf of the prosecution. But it appears from the cross-examination that the said accused has not placed the order to him nor some of the accused i.e. accused No.3 Chandrakant Mekale and Prakash Narote accused No.4 and eight ten other persons were present in the Ravishankar bungalow when the order was delivered by the P.W. Thus, the evidence of this P.W. also has not established that there was plan of the accused to commit certain offence.

11. No other evidence except mentioned above is on record in respect of the plot or plan to kill Subhash Narote and Balu Shinde is on record. It is true that there is some evidence in respect of the ownership or possession of Ravishankar bungalow by accused

> No.1. But at this stage it will be proper to mention that without going through the said evidence the prosecution has not established any other evidence that there was plot or plan to kill Subhash Narote and Balu Shinde and as such said evidence will not be relevant to prove the conspiracy and the plot to kill Subhash Narote and Balu shinde, and it has come connection as per the prosecution to prove that the accused has managed to kill deceased Ganesh Kolekar. Subhash Narote died but evidence of Balu Shinde is not on record. Therefore, at the proper time the said evidence will be scrutinized.
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> 12. Considering all the evidence on record, it is clear that the prosecution failed to establish that there were meetings between accused Nos. 1 to 12 and 15 and some absconding accused and then they decided to take the help of the members of Thapa gang from Bombay and accordingly the members of Thapa gang had been to Solapur and with the help of said members the plan was conducted or came into existence. Hence, I answer the point in the negative accordingly."

5. It will be clear from the aforesaid finding that Court did not believe the case of conspiracy because two main witnesses i.e. PW-10 and PW-11 did not support the prosecution. We asked the learned A.P.P., after our reading of the evidence of those two witnesses, whether he will be in a position to make out the case of conspiracy against the accused. The learned A.P.P. fairly conceded that when the witnesses have not supported the prosecution at all, it will be impossible for him to make out the case of conspiracy. However, apart from the aforesaid concession made by the learned

A.P.P., we were taken through the depositions of PW-10 and PW-11 as well as another prosecution witness PW-22 on the point of conspiracy but they have not supported the case of conspiracy on a single point and, therefore, we have to confirm the finding of the Trial Court that the prosecution has failed to prove the conspiracy.

6. Therefore, if the theory of conspirary goes away, then the inter-linking of the accused with the main accused also varies particularly in view of the aforesaid two judgments of the Supreme Court. Accused No.10 whose shot has resulted in death of Ganesh Kolekar, died during the pendency. He was the main accused because at his behest the so-called conspiracy was hashed. The prosecution failed to prove the conspiracy. Therefore all the connections between accused No.10 and other accused stand not proved.

7. In view of this back ground, following the aforesaid two judgements and the separate reasoning given by us, we do not find any reason to interfere with the order of acquittal.

8. The appeal is disposed of accordingly.

9. The accused were on bail. Their bail bonds stand

cancelled.

(D.G. DESHPANDE, J.)

(SMT. NISHITA MHATRE, J.)